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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. PORFILIA RENEE MENDIOLA et al., Defendants and Appellants.	E043582 (Super.Ct.No. BLF004058) OPINION

APPEAL from the Superior Court of Riverside County. James S. Hawkins, Judge. Affirmed with directions.

Richard Glen Boire, under appointment by the Court of Appeal, for Defendant and Appellant Mario Barreras.

John L. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant Porfilia Renee Mendiola.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Rhonda Cartwright-

Ladendorf and Christine Levingston Bergman, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants Porfilia Renee Mendiola and Mario Barreras appeal from judgments entered against them following jury convictions for possessing heroin (Health & Saf. Code, § 11350, subd. (a); count 1), possessing heroin while armed with a loaded firearm (Health & Saf. Code, § 11370.1; count 2), being a felon in possession of a firearm (Pen. Code, § 12021, subd. (a)(1);[1] count 3), making or possessing fictitious bills or notes with intent to defraud (§ 476; count 4), possessing a counterfeiting apparatus (§ 480, subd. (a); count 5), and possessing drug paraphernalia (Health & Saf. Code, § 11364; count 6).

Barreras admitted four prior conviction allegations and Mendiola admitted two. (§ 667.5, subd. (b).) The trial court sentenced Barreras to state prison for eight years four months. Mendiola was sentenced to seven years four months.

Mendiola contends the trial court violated her *Miranda*[2] rights by allowing evidence that she told an officer where a gun was hidden when questioned without having been advised of her *Miranda* rights. Mendiola also argues there was insufficient evidence to support her convictions. Both Mendiola and Barreras argue that sentencing on counts 3 and 4 should have been stayed under section 654.

We reject Mendiola's *Miranda* and sufficiency of evidence contentions. We also reject defendants' contentions that sentencing on count 3 must be stayed. Defendants'

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[1] Unless otherwise noted, all statutory references are to the Penal Code.

[2] *Miranda v. Arizona* (1966) 384 U.S. 436, 444-445 (*Miranda*).

sentences on count 4, however, must be stayed under section 654, as agreed by the People. Accordingly, defendants' sentences are reversed as to count 4, with defendants' judgments affirmed in all other respects.

1. Facts

On June 14, 2006, officers Coe, Rodriguez, and Paixao went to Paradise Inn (hotel) to conduct a parole search on Barreras. Upon arriving at the hotel, the hotel manager, Hope Franco, told the officers Barreras was staying in room 210 and gave Coe a key to the room. Barreras was the only registered occupant of the room. He had been a tenant at the hotel beginning in the summer of 2006. Mendiola had not been a registered tenant but Franco had seen her come and go and had been told Mendiola was Barreras's girlfriend. Sometimes Mendiola would pay the rent for Barreras in the main office. Franco believed defendants had been living together at the hotel for over a month.

When Paixao attempted to enter the hotel room on June 14, the door was closed in his face. The three officers drew their guns and Paixao used the key to open the hotel room door. The officers announced they were conducting a parole search. When the officers entered the room, Mendiola was sitting on the bed, Barreras was coming out of the bathroom, Ernest Leivas was laying on a couch, and Eduardo Sanchez was by the entry door. Coe noticed fake and washed bills and a couple baggies of marijuana on the bed where Mendiola was sitting. The officers detained the four occupants in handcuffs and, with the exception of Mendiola, had them step outside the room.

Coe asked Mendiola "if there were any other items in the room." She nodded her head and said there was a gun. Coe then searched the area of the bed where Mendiola

indicated the gun was located and found the loaded gun under the bed, near the nightstand. Coe also found 0.7 grams of heroin in a plastic lipstick container in the same general area on the bed.

The officers found packaging material for heroin in the nightstand next to the bed, a gram scale, a glass methamphetamine pipe, a printer/scanner/copier, and a laptop computer. There was also oven cleaner, which could be used for washing the ink off the paper money and then printing higher denomination money. There were 25 unwashed $1 bills and bills in denominations of $5 and $10, with no security strips or watermarks.

After Barreras was advised of his *Miranda* rights, he stated that the heroin, methamphetamine pipe, scale, and counterfeit money all belonged to him. He admitted washing the money with the oven cleaner and using the printer to make counterfeit money. Barreras denied owning the gun. He claimed it was already in the room when defendants rented the room.

2. *Miranda* Violation

Mendiola contends the trial court violated her *Miranda* rights when Coe asked Mendiola "if there were any other items in the room other than the obvious contraband and fake money that was in plain view." She nodded her head and said there was a gun. At the time she was handcuffed and had not been advised of her *Miranda* rights.

At trial, Mendiola's attorney moved to strike Mendiola's statements about the gun and requested the trial court to admonish the jury not to consider the statement. The trial court denied the motion on the ground the statement was admissible under the public

safety exception. Mendiola argues the exception does not apply because there was no continuing threat to the safety of the public or the officers.

The People argue the exception applies because, before the encounter with defendants, Coe had been informed that Barreras would use a shotgun if approached by law enforcement, and it would have taken Barreras only seconds to grab and shoot the officers with the hidden gun.

Under *Miranda*, *supra*, 384 U.S. at pages 444-445, suspects who are subjected to custodial interrogation must be told they have a right to remain silent, that anything they say can and will be used against them in court, that they are entitled to the presence of an attorney during questioning, and that if they cannot afford an attorney, one will be appointed for them. (*Ibid.*) Statements obtained in violation of this rule cannot be used to establish the suspect's guilt. (*Ibid.*)

The *Miranda* advisements are required only when a person is subjected to "'custodial interrogation.'" (*People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1161.) It is undisputed that Mendiola was in custody when Coe asked her if there were any other items in the room other than those in plain view. It is also clear that Coe's inquiry constituted an interrogation for purposes of *Miranda*. The only issues here are whether the public safety exception applies and, if not, whether there was prejudicial error.

The public safety exception was created by the United States Supreme Court in *New York v. Quarles* (1984) 467 U.S. 649. The court in *Quarles* held that "there is a 'public safety' exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence, and that the availability of that

exception does not depend upon the motivation of the individual officers involved." (*Id.* at pp. 655-656.) The *Quarles* court decided that when officers are faced with a situation threatening the safety of the general public, such as a firearm hidden by a suspect in a public place, the need for answers to questions concerning the whereabouts of a missing firearm outweigh the interests protected by the prophylactic *Miranda* warnings. (*Id.* at p. 657.)

Here, it appears the exception did not apply because defendants were in handcuffs, and Barreras and the two other men who were in the hotel room when the officers arrived were removed from the hotel room. Although it was believed Barreras would use a gun if approached by law enforcement, Barreras not only was handcuffed, but had also been taken out of the hotel room. The other two men were also removed from the room and ultimately released upon law enforcement concluding they were not culpable. There does not appear to be any evidence that, under these circumstances, there was any danger to the public or the officers when Coe questioned Mendiola. The room had been secured and defendants were handcuffed.

Assuming the exception does not apply and Coe should have advised Mendiola of her *Miranda* rights before questioning her, any such error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) As to discovery of the gun as a consequence of Mendiola's statement, it is highly likely the gun would have been ultimately discovered by lawful means even if Mendiola had not told Coe about the gun. The gun was found under the bed by the nightstand, where it was easily accessible. The circumstances were such that the officers knew it was likely there was a firearm in

the room. Drugs, counterfeit money, and counterfeiting equipment were in plain view. A legal parole search was permissible and would have inevitably led to officers finding the gun, even in the absence of Mendiola's statement acknowledging the presence of the gun. Before contacting Barreras at the hotel, Coe knew of Barreras's propensity to carry a weapon. During a previous encounter with Barreras, Coe found a shotgun under a mattress where Barreras was staying. Coe had been told before that encounter that Barreras would use the shotgun if approached by officers.

As to Mendiola's statement acknowledging there was a gun in the room, any such *Miranda* violation was harmless beyond a reasonable doubt because there was overwhelming evidence implicating Mendiola, even in the absence of her statement to Coe revealing she knew about the presence of the gun. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 310; *Chapman v. California* (1967) 386 U.S. 18, 24.) There was evidence Mendiola had been living with Barreras in the hotel room for over a month and that she was aware of and involved in the charged offenses, along with Barreras. Independent of any admission by Mendiola, the evidence necessary for Mendiola's convictions was overwhelming.

3. Sufficiency of the Evidence

Mendiola contends there was insufficient evidence to support each of her convictions.

Upon a challenge to the sufficiency of the evidence, we examine the whole record in the light most favorable to the judgment below and determine whether or not the

record discloses substantial evidence upon which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Rayford* (1994) 9 Cal.4th 1, 23.)

A. Counts 1, 2, and 3, Possessing Heroin, Possessing Heroin While Armed, and Being a Felon in Possession of a Gun

Mendiola asserts there was insufficient evidence she was in possession of heroin. There were four people, including Mendiola, in the hotel room at the time of the parole search and only Barreras claimed ownership of the incriminating items in the room. He stated that the others in the room did not own any of the items. In addition, Barreras was the only person registered as renting the room. Mendiola argues that her mere presence in the room when officers found the heroin, gun, and other items does not constitute substantial evidence she possessed the heroin, gun, methamphetamine pipe or counterfeiting equipment.

We disagree. There was sufficient evidence to support Mendiola's convictions. Mendiola's convictions were not based solely on her presence in the hotel room. As to possession of heroin (count 1), the heroin was found in a lipstick case with tape around it on the bed where Mendiola was sitting when the officers entered the room. There also was evidence that Mendiola had been living with Barreras in the hotel room for the past month. The jury could reasonably infer from these circumstances that Mendiola knew there was heroin in the lipstick container and she was in possession of the heroin: "'Possession may be imputed when the contraband is found in a location which is immediately and exclusively accessible to the accused and subject to his dominion and control' [citation] or which is subject to the joint dominion and control of the accused and

another." (*People v. Francis* (1969) 71 Cal.2d 66, 71 (*Francis*).) The jury could reasonably have found that Mendiola was in possession of the heroin, in violation of Health and Safety Code section 11350, subdivision (a).

Mendiola argues there were two other men, Sanchez and Leivas, in the room, in addition to defendants. But there was no evidence connecting Sanchez and Leivas with the contraband, other than their mere presence in the room.

As to counts 2 and 3, there was likewise sufficient evidence to support Mendiola's conviction for possessing heroin while armed with a loaded firearm (Health & Saf. Code, § 11370.1) and conviction for being a felon in possession of a firearm (§ 12021, subd. (a)(1)). As discussed in the preceding section, even in the absence of Mendiola's statement informing Coe there was a gun in the room, there was sufficient evidence from which the jury could reasonably infer Mendiola knew about the gun. The gun was found under the bed Mendiola was sitting on when the officers entered the room. The gun was easily accessible and loaded. There was no evidence that the gun belonged to Sanchez or Leivas.

In addition, there was evidence Mendiola had been living with Barreras for over a month at the hotel. Under such circumstances, "[t]he inference of dominion and control is easily made when the contraband is discovered in a place over which the defendant has general dominion and control: his residence." (*People v. Jenkins* (1979) 91 Cal.App.3d 579, 584 (*Jenkins*).)

Mendiola argues the hotel manager's statement that Mendiola was living with Barreras in the hotel room was speculative and Coe testified he did not recall seeing a

purse or women's clothing in the hotel room. However, other officers found bins of clothing in the room. The officers did not determine whether there were any female clothing items in the bins. Even if she was not living in the room, there was sufficient evidence that she had dominion and control over the heroin and gun since the gun and heroin, as well as other illegal items, were within her reach on or under the bed where Mendiola was sitting. No one else was sitting on the bed when the officers arrived. (*Jenkins*, *supra*, 91 Cal.App.3d at p. 584.) Also, as to count 3, being a felon in possession of a gun, the parties stipulated that Mendiola had a prior felony conviction.

Under these circumstances, we conclude there was sufficient evidence to support Mendiola's convictions for possessing heroin, possessing heroin while armed with a gun, and being a felon in possession of a firearm.

B. Possession of Altered Banknotes, Counterfeit Equipment, and Drug Paraphernalia

Mendiola argues there was insufficient evidence supporting her count 4 and 5 convictions for making or possessing fictitious bills or notes with intent to defraud (§ 476) and possessing a counterfeiting apparatus (§ 480, subd. (a)). Mendiola also asserts there was insufficient evidence that she was in possession of a methamphetamine pipe found in the nightstand drawer (count 6).

We conclude there was sufficient evidence to support these convictions. When the officers entered the hotel room, the officers observed scattered on the bed where Mendiola was sitting counterfeit bills, and washed bills that appeared to be in the process of being counterfeited. There also was a laptop computer on the bed with defendants'

names, "'Mario and Rene,'" on the screen saver. Nearby in the hotel room, on the refrigerator, were two cans of oven cleaner that could be used to remove ink off of money. Also nearby, next to the TV, was a scanner/copier/printer/fax machine and a package of printing paper. Next to the bed, in the nightstand, was a gram scale, packaging material consisting of small baggies used to weigh and separate narcotics for sale, and a methamphetamine pipe. Coe testified that in his opinion the copier, printer paper, oven cleaner, and bills were being used to make counterfeit money.

This evidence was sufficient to support a finding that Mendiola had dominion and control over the altered banknotes and counterfeit equipment since the items were within her reach on or near the bed or were within a short distance from Mendiola, and there was evidence that Mendiola had been living in the room with Barreras for over a month. (*Francis*, *supra*, 71 Cal.2d at p. 71; *Jenkins*, *supra*, 91 Cal.App.3d at p. 584.) Such was also the case with regard to the methamphetamine pipe.

4. Sentencing Error

Defendants contend sentencing on count 3 (felon in possession of a firearm) must be stayed under section 654 because defendants were convicted and sentenced for the same conduct in count 2 (possession of heroin while armed with a firearm). Defendants argue that multiple punishments for possession of the same firearm are improper under section 654.

Section 654, subdivision (a), provides in pertinent part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case

shall the act or omission be punished under more than one provision." Section 654 precludes multiple punishments not only for a single act, but for an indivisible course of conduct. (*People v. Hester* (2000) 22 Cal.4th 290, 294; *People v. Harrison* (1989) 48 Cal.3d 321, 335.)

The trial court's determination as to whether section 654 applies "is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence. [Citation.]" (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143 (*Jones*).)

Whether a course of conduct is indivisible for purposes of section 654 depends on the intent and objective of the actor. If all the offenses are incidental to one objective, the defendant may be punished for any one of them, but not for more than one. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives that were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. (*People v. Centers* (1999) 73 Cal.App.4th 84, 98; *In re Adams* (1975) 14 Cal.3d 629, 634.)

Whether a violation of section 12021, forbidding a felon from possessing a firearm, constitutes a divisible transaction from another offense involving possession or

use of the weapon "'"depends upon the facts and evidence of each individual case. Thus where the evidence shows a possession distinctly antecedent and separate from the primary offense, punishment on both crimes has been approved. On the other hand, where the evidence shows a possession only in conjunction with the primary offense, then punishment for the illegal possession of the firearm has been held to be improper where it is the lesser offense."' [Citations.]" (*Jones*, *supra*, 103 Cal.App.4th at p. 1143.)

In *People v. Harrison* (1969) 1 Cal.App.3d 115, the court held that the defendant could be punished for convictions of both section 12021 (ex-felon in possession of a firearm) and section 12031, subdivision (a) (carrying a loaded firearm in a vehicle on a public street), even when both charges involved the same weapon. The court explained: "The two statutes strike at different things. One is the hazard of permitting ex-felons to have concealable firearms, loaded or unloaded; the risk to public safety derives from the type of person involved. The other strikes at the hazard arising when any person carries a loaded firearm in public. Here, the mere fact the weapon is loaded is hazardous, irrespective of the person (except those persons specifically exempted) carrying it. [¶] The 'intent or objective' underlying the criminal conduct is not single, but several, and thus does not meet another of the tests employed to determine if Penal Code section 654 is violated. [Citation.] For an ex-convict to carry a concealable firearm is one act. But loading involves separate activity, and while no evidence shows that appellant personally loaded the pistol, there seem little distinction between loading and permitting another to do so. Thus, two acts, not a single one, are necessarily involved and bring our case outside the prohibition against double punishment for a single act or omission. We

therefore hold contrary to appellant's contentions on this point." (*People v. Harrison*, at p. 122.)

Applying the above principles, we conclude defendants were appropriately sentenced to consecutive terms. The proper focus here is on the separate criminal acts of (1) possession of heroin while armed with a gun, and (2) being a felon in possession of a firearm. The fact that defendant committed two separate crimes simultaneously by the single act of possession of a firearm alone does not bring this case under the purview of section 654.

In addition, the two criminal statutes for possession of heroin while armed and being a felon in possession of a firearm "strike at different things. One is the hazard of permitting ex-felons to have concealable firearms, loaded or unloaded; the risk to public safety derives from the type of person involved." (*People v. Harrison*, *supra*, 1 Cal.App.3d at p. 122.) The other statute strikes at the hazard arising when a person possesses a controlled substance, such as heroin, while armed. Health and Safety Code section 11370.1 was intended to protect the public and to peace officers "by deterring drug users from possessing operable firearms while under the influence." (*People v. Pena* (1999) 74 Cal.App.4th 1078, 1082.) The trial court's imposition of sentences for counts 2 and 3 thus did not violate section 654.

As to sentencing on counts 4 and 5, the parties agree defendants' sentences on count 4 (possession of counterfeit money) must be stayed because the sentencing constitutes multiple punishment under section 654. Defendants' criminal acts of possessing counterfeit money (count 4) and possessing counterfeiting equipment (count

5) were committed during the indivisible course of conduct of making counterfeit money. Thus, defendants cannot be punished for both counts 4 and 5. The midterm for count 4 is two years. The midterm for count 5 is three years. Therefore, defendants' sentence on count 4 must be stayed, as agreed by the parties.

5. Disposition

The matter is remanded with directions to resentence defendants in accordance with this opinion, such that defendants' sentences on count 4 are stayed under section 654. After resentencing, the trial court is directed to prepare amended abstracts of judgments and minute orders which accurately reflect the sentences imposed and to forward certified copies of the amended abstracts of judgments to the Director of the Department of Corrections and Rehabilitation. In all other respects, the judgments are affirmed.

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s/Gaut
J.

We concur:

s/Ramirez
P. J.

s/Richli
J.